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COMMONWEALTH OF KENTUCKY,

Petitioner

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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I hereby certify that a copy of this brief was deposited in the U.S. Mail, first-class postage prepaid, properly addressed to Mr. David A. Smith and Ms. Carol Ullerich, Assistant Attorneys General, Counsel for Petitioner, State Capitol Building, Frankfort, Kentucky 40601-3494, on December 21, 1989.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

**Article III, §2, U.S. Constitution**

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority . . .

**Ky. Rev. Stat. 532.075(2)**

The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

## INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court respondent, Teddy Lee Cosby, by counsel, moves the Court to deny the petition for certiorari filed in this case by the Commonwealth of Kentucky because petitioner does not state sufficient grounds to demand the attention of this Court under the criteria set out by Rule 17.<sup>1</sup> The state has proposed three questions for review by this Court. The first issue is whether Richardson v. Marsh, (citation omitted) requires that all references to a defendant's existence be deleted from the confession of his non-testifying co-defendant. In this argument the state claims that the Supreme Court of Kentucky has misunderstood and misapplied the rule set out in Bruton v. U.S., 391 U.S. 123 (1968) and Richardson v. Marsh, 481 U.S. 203 (1987) and argues that there is confusion among the various jurisdictions arising from footnote 5 of Richardson v. Marsh in which the Court expressly refused to deal with the question of adequacy of redaction in co-defendant confession cases. Kentucky lists a number of different results obtained, both before and after this Court's decision in Marsh and claims that there is great confusion among the circuits and that this Court should settle the question left open by footnote 5. Respondent answers that this case does not present the issue raised by Kentucky. In this case, the Supreme Court of Kentucky correctly applied Bruton and Marsh to the facts of this case and found that it was impossible to assume that the jury could keep the evidence separated as to each defendant. That court therefore ruled that separate trials were required. Obviously, such a ruling does not deal with the question raised by the Commonwealth.

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<sup>1</sup>The statement of the case provided by Kentucky is an outline of the evidence adduced which is mostly accurate except for its interpretation of all facts in the light most favorable to the prosecution. There are some specific factual errors that should be noted. Cosby had some unspecified money problems, but according to the witness who spoke about Cosby, "so does everybody for that matter." (TE 6, 71). Cosby's car payment was \$150.00 every two weeks. (TE 7, 14). Cosby was on vacation the week before the robbery and was not even present to ask questions about receipts. (TE 6, 79). Cosby never asked the witness any questions about receipts, although he was present when Walls asked on a number of occasions. (TE 6, 79). Cosby's wife was employed full-time during this period. (TE 10, 56). The Commonwealth continues to try to prove Cosby's guilt by evidence primarily applicable to Walls.

As to the second issue raised, Kentucky is asking this Court for an advisory opinion. In this argument Kentucky maintains that the Kentucky Supreme Court has misread Beck v. Alabama, 447 U.S. 625 (1980) and Woodson v. North Carolina, 428 U.S. 280 (1976) in ruling that the statutory standard of review in capital cases [Ky. Rev. Stat. 532.075] is but a codification of U.S. Supreme Court mandate. [Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky., 1989)]. Careful reading of the state court opinion reveals that this comment is dicta because the "Ice" rule complained of is merely an application of Ky. Rev. Stat. 532.075 and that the decision of the Supreme Court of Kentucky, based on that statute, is an adequate independent state ground of decision and therefore not amenable to correction by this Court as a matter of federal constitutional law. In addition, the opinion shows clearly that review under the "Ice" standard reaches only unobjected to errors that render the trial a miscarriage of justice. [776 S.W.2d at 369]. Certainly, this Court would not let stand a conviction which under "the totality of circumstances persuades [the] Court that the defendant may not have been found guilty of a capital offense or the death penalty may not have been imposed but for the unpreserved error." [776 S.W.2d 369]. Therefore, on the merits, this Court would reach no different result from that of the Supreme Court of Kentucky. In any event, Kentucky was not injured by the "Ice" rule in this case. The argument presented by Kentucky in this case is a complaint about review of the issue presented in Question 3 of this petition, concerning double jeopardy. Reference to the Kentucky Supreme Court opinion shows clearly that this issue was not reached under Ky. Rev. Stat. 532.075 or Ice v. Commonwealth, 667 S.W.2d 671, 674 (1984) but instead was decided under another state appellate rule which allows review of cumulative punishment double jeopardy cases even in the absence of timely objection. [776 S.W.2d at 372]. Under these circumstances, Kentucky has no standing to complain because it was not injured by the application of the so-called "Ice" rule. Kentucky's request here for a review of the federal constitutional issue is a request for an advisory opinion which should be denied.

The third issue raised is a complaint about the Kentucky Supreme Court's handling of the cumulative punishment issue. In its petition, Kentucky ignores the many recent decisions of this Court in which it says that it will not override a state court's construction of its own statutes. The Supreme Court of Kentucky has construed Ky. Rev. Stat. 507.020(1)(a) and Ky. Rev. Stat. 509.040 and has decided that the General Assembly of Kentucky did not intend cumulative punishments for these offenses. Relying on Ky. Rev. Stat. 505.020 the Supreme Court of Kentucky determined that the offenses merge. As shown in Argument III of this response, this Court has on several occasions stated that when the state court of last resort construes statutes federal courts will not overrule such a construction in determining double jeopardy issues. Obviously, for this reason as well the petition for writ of certiorari must be denied.

The issues set out above will be discussed in the order presented.

- I. THE SUPREME COURT OF KENTUCKY PROPERLY DECIDED THAT COSBY WAS DENIED A FAIR TRIAL BECAUSE THE JURY COULD NOT KEEP THE EVIDENCE SEPARATED. ANY PROPOSED CONFLICT AMONG THE JURISDICTIONS CONCERNING REDACTION IS IRRELEVANT TO THIS CASE.

The Commonwealth of Kentucky has identified a conflict among the jurisdictions concerning the correct interpretation of footnote 5 of Richardson v. Marsh, 481 U.S. 200 (1987). Apparently some courts interpret Marsh to require excision of any reference to the co-defendant of the non-testifying confessor while others do not. (Petition, p. 11-12). The existence of such a controversy is irrelevant to this case because the Supreme Court of Kentucky, relying on its own Ky. R. Crim. Proc. 9.16 has ruled that Cosby is entitled to a trial separate from that of Chris Walls, the non-testifying confessor in this case. [Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky., 1989)]. The Supreme Court of Kentucky ruled

"We are compelled to conclude that Cosby was so badly prejudiced by the failure to provide separate trials that his convictions must be reversed. In the peculiar circumstances of this case the jury could not individualize



Cosby in his relation to the mass of evidence represented by Walls' statement."

The Kentucky court went on to note that an admonition as to the correct use of this evidence was given, but not until the closing argument by the co-defendant in which he tried to imply that Cosby was the "blank" referred to in the statement. As the court noted, ". . . this was as likely to compound the error as to cure it." [776 S.W.2d at 369 and 370]. The court also later noted that neither the prosecutor nor the trial judge was able to keep the evidence straight. [776 S.W.2d at 370]. From these premises "[t]he only responsible conclusion is that in present circumstances this [individualization of evidence] cannot be done." [776 S.W.2d at 370-371]. It is for this reason that separate trials have been ordered.

There is no question that the Supreme Court of Kentucky applied Bruton v. U.S., 391 U.S. 123 (1968) and Richardson v. Marsh, 481 U.S. 200 (1987) correctly. The only important inquiry in a non-testifying co-defendant confession case is whether it is safe to assume that the jury will follow its instruction not to use the confession against anyone other than the person who made it. [Bruton, 391 U.S. at 135-136; Marsh, 481 U.S. at 208; 211]. If it is safe, courts will assume that the jury used the evidence for its proper, non-hearsay purpose and no confrontation issue arises. [Marsh, 481 U.S. at 211]. If it is not safe so to conclude, Bruton requires courts to recognize that ". . . the practical and human limitations of the jury system cannot be ignored." [Marsh, 481 U.S. at 207, citing Bruton, 391 U.S. at 135-136]. The issue then, according to Marsh, is whether the jury can reasonably be expected to forget what it heard in the co-defendant's confession when it is assessing the other defendant's guilt. [481 U.S. at 208]. And, of course, even if a confrontation error occurs, it, like other constitutional errors, may be deemed harmless if the reviewing court can say beyond a reasonable doubt that it did not affect the jury's determination. [Cruz v. New York, 481 U.S. 186, 194 (1987); Chapman v. California, 386 U.S. 18 (1967)]. The ruling of the

Supreme Court of Kentucky on this issue amounts to a paraphrase of this Court's holdings set out just above.

"The fundamental premise in Bruton v. United States, supra, is that the confession of a co-defendant when utilized as evidence in a joint trial is prejudicial hearsay as to the non-confessing defendant to the extent that it incriminates him, and cannot be used unless the name of the non-confessing defendant can be so redacted or deleted that its use is harmless beyond a reasonable doubt." [Cosby v. Commonwealth, 776 S.W.2d at 370].

The Supreme Court of Kentucky has not misunderstood or misapplied this Court's precedents. Application of those precedents to the facts of this case show that there was practically no possibility that the jury would use Chris Walls' confession correctly.

In this case the prosecutor began by saying in opening that he could prove that Teddy Cosby was in the manager's office at Applegate's Landing and that he was at Fisherman's Park at the time Kevin Miller was killed. (TE 6, 14). In response to Cosby's objection, the prosecutor said that he could not use the statement to identify Cosby, but that he could use the statement to prove what had happened. (TE 6, 15). During the course of argument of the directed verdict at the close of the prosecutor's case the prosecution met respondent's argument that there was no proof that he participated in the crimes by saying that "with the statement, we know there was a second person who assisted Mr. Walls". (TE 10, 48). The prosecution also pointed out that Walls and Cosby had been together and that "[w]e know by Chris Walls' statement that during that time period is when the crime did occur." (TE 10, 49-50). As noted in the opinion, even the trial judge used Walls' statement in determining the propriety of the directed verdict motion made by Cosby. (776 S.W.2d at 370).

In ruling on respondent's objection to the prosecutor's closing argument that Cosby actually stabbed Kevin Miller the trial judge overruled saying that it was

"An argument incorporating a reasonable inference from the evidence that has been introduced . . . The evidence introduced is the statement of Kevin (sic) Walls, the person that was with him did the stabbing. The evidence by the Commonwealth was that the person with him was Teddy Cosby, thus the reasonable inference

that Teddy Cosby did the stabbing." (TE 11, 84).

Of course, the only evidence that any person other than Chris Walls was at Fisherman's Park where Kevin Miller was stabbed was Walls' statement to police, which was inadmissible hearsay as to Cosby. If the trial judge thought this was fair use of the confession, there is little doubt that the jury would reach the same conclusion.

During the course of this same closing argument the prosecutor used Walls' statement to tie Cosby to the car that Walls used that night, and to argue that Cosby was the other person with Chris Walls in the Applegate's Landing office, armed with the kitchen knife that was the purported murder weapon. (TE 11, 96; 100-101). Of course, again, the evidence used by the prosecutor came from the statement made by Chris Walls. The only admonition about the proper use of this confession came during the co-defendant's closing argument. (TE 11, 64). This argument preceded the closing argument of the prosecutor. Obviously, the admonition had little effect, because the prosecutor did not hesitate to use Walls' confession to establish facts that would link Cosby with the offense. Thus, the Supreme Court of Kentucky correctly concluded that "this [admonition] was as likely to compound the error as to cure it." [Cosby, 776 S.W.2d at 369]. There can be no credible argument that the jury did not use the statement of Chris Walls in determining Teddy Cosby's guilt. Certainly, no court could find the use of such evidence harmless beyond a reasonable doubt. Thus, Kentucky's claim that the Supreme Court of Kentucky has misunderstood Marsh and Bruton is simply wrong. This claim is amply refuted in the state court opinion, particularly where the Supreme Court of Kentucky acknowledges that Marsh states a rule under which "a joint trial utilizing a properly redacted statement is appropriate where given the totality of circumstances no substantial prejudice will result." [Cosby, 776 S.W.2d at 370]. Kentucky's claim on this point must be rejected. The fact that there may be "confusion" among the jurisdictions as to footnote 5 of Marsh is not grounds to grant review in this case. In this case

the prosecutor systematically used the co-defendant's confession to establish critical points of evidence against Cosby. Of course redaction failed to prevent prejudice in this case. The only confusion present here is Kentucky's understanding of the Supreme Court of Kentucky's opinion. Review under these circumstances should be denied.

**II. REVIEW SHOULD BE DENIED BECAUSE KENTUCKY IS ASKING THIS COURT FOR AN ADVISORY OPINION CONCERNING THE CONSTITUTIONAL UNDERPINNINGS OF KENTUCKY'S CAPITAL APPELLATE REVIEW RULE.**

On page 13 of its petition, Kentucky points out that of 35 issues raised on direct appeal, 19 were unpreserved. Kentucky also notes on page 13 that the Supreme Court of Kentucky reversed, as to Cosby, on two grounds, one of which was unpreserved. "(Question #3 herein)". Question #3 concerns the cumulative punishment argument dealt with by the Supreme Court of Kentucky on pages 372-373 of the Kentucky court opinion. On page 372 the Supreme Court of Kentucky explicitly bases its review on the merits on state court rules as follows

"Because this is a double jeopardy claim it must be considered even though it was not preserved by objection for appellate review. Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984); Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977)". [Cosby, 776 S.W.2d at 372].

The double jeopardy question was reviewed under a Kentucky legal principle which allows review of unpreserved cumulative punishment double jeopardy arguments. The Supreme Court of Kentucky premised its review explicitly on this rule by citing the cases set out in the excerpt. On direct appeal to the State Supreme Court respondent presented his claim under Ky. R. Crim. Proc. 10.26 (plain error rule) and Sherley v. Commonwealth, cited above. (Appellant's Brief, p. 97). This rule of Kentucky appellate law is applied consistently in criminal law cases. [e.g. Kinser v. Commonwealth, 741 S.W.2d 648, 654 (Ky., 1987), "of course a double jeopardy violation can be reviewed despite the lack of preservation."; Jones v. Commonwealth, 756 S.W.2d 462 (Ky., 1988),

"the appellant may properly raise a double jeopardy claim even though it was not preserved by objection for appellate review."]. It is clear that review of the double jeopardy claim in this case was based on state law dealing with double jeopardy claims and not on any law dealing with death penalty cases. This basis of review is a separate, adequate, and independent state ground as that concept is defined by Michigan v. Long, 463 U.S. 1032 (1983) and Kentucky v. Stincer, 482 U.S. 730 (1987). It is clear from the face of the Kentucky Supreme Court opinion that it is not following an Eighth or Fourteenth Amendment-compelled rule of review on this particular issue. Therefore, this Court has no grounds for assuming that the state court believed that its decision was - compelled by federal law. [Michigan v. Long, 463 U.S. at 1040-1041]. Rather, the contrary conclusion is shown clearly in the state court opinion.

Kentucky does not present the Court with a justiciable controversy on this issue. Article III of the Constitution permits the Court to decide only cases or controversies. Because Kentucky does not show that it was injured by the ruling concerning Ky. Rev. Stat. 532.075 (if it was a ruling) it has no standing to complain. Even if the Court were to rule favorably on Kentucky's argument concerning Ky. Rev. Stat. 532.075 review, the ruling would have no effect. Review of the double jeopardy argument was based on other grounds. Therefore, Kentucky is asking this Court for an advisory opinion, ". . . a function never conferred upon it by the Constitution and against the exercise of which this Court has steadily set its face from the beginning." [Muskrat v. U.S., 219 U.S. 346, 361 (1911); 1 Rotunda, et. al, Treatise on Constitutional Law, §2.13, p. 98-100; 101-102 (1986)]. In this question Kentucky asks the Court to decide whether the Kentucky Supreme Court has misinterpreted the holdings of Beck v. Alabama, 447 U.S. 625 (1980) and Woodson v. North Carolina, 428 U.S. 280 (1976), (Petition, p. 13-14) and is "laboring under the mistaken impression that the death is different approach required in evidentiary matters also requires a state court to abandon its rules of procedure." (Petition, p. 15). But the Supreme Court of Kentucky used its own

rules of procedure to reach and decide the question of double jeopardy in Cosby's case. Respondent therefore respectfully states that any resolution of Kentucky's claim about Beck and Woodson would be irrelevant to this case. In any event, it is clear that the comment concerning Beck and Woodson is simply dicta.

On page 369 of Cosby v. Commonwealth the court stated that its rule of review set out in Ice v. Commonwealth, 667 S.W.2d 671, 674 (Ky., 1984) "is generated by KRS 532.075, the statute specifying the duties of our Court in reviewing death penalty cases . . .". The court adopted this position because "[i]t is a function of the General Assembly to say when and if the death penalty shall be imposed, and this includes the right to prescribe the special type of review of punishment and errors enumerated by way of appeal prescribed in KRS 532.075, limited only by the Kentucky Constitution, the United States Constitution, and the decisions of the United States Supreme Court." [776 S.W.2d at 369]. Fair reading of the state court opinion shows that review in death penalty cases is a result of the Kentucky Supreme Court's construction of Ky. Rev. Stat. 532.075. Any discussion of this Court's cases is simply an explanation of the source of the "idea of imposing a higher standard of review in cases where the death penalty has been imposed . . .". [776 S.W.2d at 369]. Therefore, the state is asking this Court to review dicta comments made by the Supreme Court of Kentucky. This is not a proper use of the certiorari power. And, in any event, this Court certainly would agree that any court should review an error, preserved or unpreserved, that under the circumstances persuades the Court that the defendant might not have been found guilty of a capital offense or sentenced to death but for the error.. That is all the "Ice" rule says. [776 S.W.2d at 369]. Because no useful purpose would be served by consideration of Question #2, certiorari should be denied.

III. THE KENTUCKY SUPREME COURT CORRECTLY INTERPRETED STATE CRIMINAL STATUTES GOVERNING KIDNAPPING AND MURDER. FEDERAL COURTS DO NOT RE-INTERPRET STATUTES CONSTRUED BY A STATE COURT OF LAST RESORT IN CUMULATIVE PUNISHMENT DOUBLE JEOPARDY CASES.

In Banner v. Davis, 886 F.2d 777, 779-781 (6th Cir., 1989) the basic principles of cumulative punishment analysis are set out: (1) The double jeopardy clause protects against multiple punishments for the same offense. [Brown v. Ohio, 432 U.S. 161, 165 (1977)]; (2) Whether punishments are "multiple" under the double jeopardy clause is essentially a question of legislative intent. [Missouri v. Hunter, 459 U.S. 359, 366-368 (1983)]; (3) When assessing the intent of a state legislature, a federal court is bound by a state court's construction of that state's own statutes. [Missouri v. Hunter, 459 U.S. at 368]; and (4) The Blockburger [v. U.S., 284 U.S. 299 (1932)] test is simply a rule of federal statutory construction. [Whalen v. U.S., 445 U.S. 684, 691-692; Banner v. Davis, 886 F.2d at 781].

In Ohio v. Johnson, 467 U.S. 493, 499, fn. 8 (1983) the Court held that ". . . the Blockburger test does not necessarily control the inquiry into the intent of the state legislature." From this it is clear that Blockburger is not necessarily a test for determining federal constitutional violations. Kentucky's reliance on the case as a federal test for determining cumulative punishment violations (Petition, p. 19) is misplaced. The inquiry here is not whether the Supreme Court of Kentucky may have misapplied a federal standard. The inquiry rather is what types of punishment the General Assembly of Kentucky intended to allow when it enacted Ky. Rev. Stat. 507.020 and Ky. Rev. Stat. 509.040. The only court authorized to make that determination is the Supreme Court of Kentucky. -

In its opinion, the Supreme Court of Kentucky applied Ky. Rev. Stat. 505.020(2)(a) which provides that an offense merges with another when it is established by proof of the same or less than all of the facts required to establish the commission of the [other] offense." [Cosby, 776 S.W.2d at 372]. The Kentucky court noted that this is a statutory codification of Blockburger, but



that the rule could not be applied in the abstract. Thus, under the circumstances of this case, where the proof of murder is relied on to establish the capital offense of kidnapping, "the offenses merge." [776 S.W.2d at 373]. This is because ". . . [t]he additional element that aggravates kidnapping to a capital offense is the murder." [776 S.W.2d at 373]. The validity of this conclusion is shown easily by reference to the statutes involved.


The jury in this case was instructed on intentional murder and on kidnapping, capital offense. (TR, 423-425). Intentional murder is proved when the prosecutor shows that the defendant, with the intent to cause the death of another, causes the death of that person or of a third person. [Ky. Rev. Stat. 507.020(1)(a)]. Kidnapping consists of unlawful restraint of another with the intent to accomplish one of five unlawful purposes. [Ky. Rev. Stat. 509.040(1)]. It is a capital offense when the kidnapped person is not released alive. [Ky. Rev. Stat. 509.040(2)]. The phrase "when the victim is not released alive" refers to the victim's death caused by some aspect of the kidnapping. [776 S.W.2d at 372]. This conclusion is compelled by the limitation on criminal liability found at Ky. Rev. Stat. 501.030 which prohibits conviction of a criminal offense unless there is the conjunction of a voluntary act or omission and a culpable mental state as defined in Ky. Rev. Stat. 501.020. Murder consists of the voluntary act of killing another and the conscious purpose to do so. Certainly, the phrase not released alive is broad enough to encompass such an act. Obviously, the Supreme Court of Kentucky accepted respondent's argument that this language was broad enough to cover the murder of the kidnap victim. This construction of Kentucky's statutory language is not open to question at this point. [Missouri v. Hunter, 459 U.S. at 368]. The Kentucky Supreme Court has determined, by a method provided by the General Assembly of Kentucky [Ky. Rev. Stat. 505.020], that the General Assembly did not intend cumulative punishments for murder and capital kidnapping. Because of this finding, the issue of double jeopardy is closed. Because grant of certiorari on this

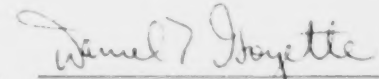


issue could serve no useful purpose respondent respectfully moves the Court to deny Kentucky's request for certiorari.

CONCLUSION

For the reasons set out above the Court is urged to deny the petition for writ of certiorari requested in this case.

  
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